

## THE CONSTITUTIONALITY OF UTAH'S 2005 TUITION TAX CREDIT PROPOSALS

## I. INTRODUCTION

For the past several years, Utah's Legislature has considered elementary and secondary school choice plans, including tuition tax credits.<sup>1</sup> While the Legislature has yet to enact a school-choice regime, the issue continues to play a prominent role in Utah politics.<sup>2</sup> In 2005 the Legislature considered, but failed to adopt, three proposals for a tuition tax credit.<sup>3</sup> Tuition tax credits to encourage school choice present two Constitutional issues: (1) potential violations of the Establishment Clause<sup>4</sup> and (2) potential violations of the Equal Protection Clause.<sup>5</sup> School choice programs, including tuition tax credits and vouchers, are still a source of controversy.<sup>6</sup>

Tuition tax credits can run afoul of the Establishment Clause if they impermissibly advance religion.<sup>7</sup> As tuition tax credits help fund religious schools, they must be crafted to provide government aid that is neutral with respect to religion and funnel aid to religious schools only as a result of genuine and independent choices by a broad group of parents.<sup>8</sup> Tuition tax credits might also violate the Equal Protection Clause if state legislatures structure them to treat similarly situated parents in a dissimilar fashion for no legitimate state purpose.<sup>9</sup>

This Comment will examine the three 2005 Utah tuition tax credit proposals in light of the Establishment Clause and the Equal Protection Clause. This Comment is not a normative policy analysis: it makes no policy conclusions on the desirability or efficacy of tuition tax

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<sup>1</sup> Matt Canham, *School-voucher Group Hopes to Oust Opponents*, THE SALT LAKE TRIBUNE, Mar. 13, 2006, at B1.

<sup>2</sup> *Id.*

<sup>3</sup> *Infra* Part II.

<sup>4</sup> *Infra* Part IV.A.

<sup>5</sup> *Infra* Part IV.B.

<sup>6</sup> E.g., Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, (2003); Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317 (1997); Deborah Katz Levi, Comment, *Tuition Tax Credit Proposals in Utah – Their Constitutionality and Feasibility*, 2005 UTAH L. REV. 1047 (2005).

<sup>7</sup> *Infra* Part IV.A.

<sup>8</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>9</sup> See John E. Nowak & Ronald D. Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. DAVIS L. REV. 273, 302 (1987).

credits in Utah. Rather, this Comment presents a positive Constitutional analysis of the three proposals in light of the current state of Supreme Court jurisprudence in the areas of the Establishment Clause and Equal Protection. This Comment argues that all three 2005 Utah tuition tax credit proposals conform to the requirements of the Establishment Clause. This Comment further argues that only one of the three tuition tax credit proposals is valid under the Equal Protection Clause.

Part II discusses in detail the attributes of the three tax credit proposals before the Utah Legislature in 2005. Part III of the Comment discusses the Supreme Court's Establishment Clause jurisprudence, with particular focus on school choice programs and the court's 2002 decision in *Zelman v. Simmons-Harris*. Part III also analyzes Supreme Court cases regarding state tax laws and the Equal Protection Clause. Part IV presents a positive analysis of the tuition tax credit proposals under both Establishment Clause and Equal Protection Clause frameworks and offers recommendations for the Utah Legislature's future consideration of tuition tax credit proposals.

## II. The 2005 Utah Tuition Tax Credit Proposals

In 2005, the Utah Legislature considered three versions of H.R. 39, Tuition Tax Credits.<sup>10</sup> For purposes of this Paper, these versions shall be referred to as the "Original" (dated December 15, 2004),<sup>11</sup> the "First Substitute" (dated January 27, 2005),<sup>12</sup> and the "Second Substitute" (dated February 10, 2005).<sup>13</sup> The final version, the Second Substitute, failed in the Utah House of

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<sup>10</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005), available at <http://www.le.state.ut.us/~2005/bills/hbillint/hb0039.pdf>; Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005), available at <http://www.le.state.ut.us/~2005/bills/hbillint/hb0039s01.pdf>; Tuition Tax Credits, H.R. 39 2d Substitute, 56th Leg., Gen. Sess. (Utah 2005), available at <http://www.le.state.ut.us/~2005/bills/hbillamd/hb0039s02.pdf>.

<sup>11</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>12</sup> Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>13</sup> Tuition Tax Credits, H.R. 39 2d Substitute, 56th Leg., Gen. Sess. (Utah 2005).

Representatives on February 25, 2005 by a vote of 34 to 40.<sup>14</sup> Parental choice programs for elementary and secondary schools have failed for several consecutive years in the Utah Legislature.<sup>15</sup> In 2006, a school voucher program did not pass the Utah Legislature, as the bill's sponsor, believing he did not have the required votes for passage, pulled the measure from House consideration.<sup>16</sup> Among the reasons for offering tuition tax credits in Utah were to empower parents to make the best educational decision for children and to relieve financially strapped Utah public schools from the burden of increasing numbers of students.<sup>17</sup>

While similar, there were important differences between the three bills. The Original Tuition Tax Credit bill provided a refundable tax credit against individual income taxes for amounts paid to a private school as tuition on behalf of a qualifying student.<sup>18</sup> The bill limited the tuition tax credit to the lesser of 50% of tuition expenses for private elementary and secondary school, up to a maximum credit of the lesser of (1) \$2,000 or (2) \$3,000 minus the total amount of tuition grants the student received.<sup>19</sup> The proposal created a refundable credit, meaning that a taxpayer claiming the credit might not pay any Utah income tax and might also receive a tax refund from the state.<sup>20</sup> For example, Harry has a 2006 Utah state income tax liability of \$1,000 before considering a tuition tax credit. Harry paid \$4,000 in tuition to a private

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<sup>14</sup> Utah H.R., 56th Leg., Gen. Sess., Vote Tabulation Tuition Tax Credits (Feb. 25, 2005), available at <http://www.le.state.ut.us/~2005/status/hbillsta/hb0039s2.002h.txt>.

<sup>15</sup> Jennifer Toomer-Cook, *Science Ed Bill Sees Defeat*, DESERET MORNING NEWS (Utah), March 2, 2006; Matt Canham, *School-voucher Group Hopes to Oust Opponents*, THE SALT LAKE TRIBUNE, March 13, 2006, at B1.

<sup>16</sup> Jennifer Toomer-Cook, *Science Ed Bill Sees Defeat*, DESERET MORNING NEWS (Utah), March 2, 2006; Matt Canham, *School-voucher Group Hopes to Oust Opponents*, THE SALT LAKE TRIBUNE, March 13, 2006, at B1.

<sup>17</sup> Royce Van Tassell, Position Paper for Tuition Tax Credits, in Utah State Univ., Estimating Demand and Supply Response to Tuition Tax Credits for Private School Tuition in Utah 79 (Nov. 1, 2004) available at: <http://www.edexutah.org/pdfs/FinalDraft-pdfformat1.pdf> (last visited Mar. 20, 2006).

<sup>18</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>19</sup> *Id.*

<sup>20</sup> See Sean W. Mullaney, Comment, *More Than Just a Diploma: Roth IRA Conversions Sheltered by the Lifetime Learning Credit*, 14 GEO. MASON L. REV (forthcoming 2007).

elementary school for his son Harry Jr. Under the Original H.R. 39's tuition tax credit, Harry would not pay any income tax, and would receive a \$1,000 check from the State of Utah.<sup>21</sup>

The student had to be a "qualifying student" meaning the student was not enrolled in a private school on January 1, 2005 and was not enrolled in a private school kindergarten during the 2005-2006 school year.<sup>22</sup> Essentially, only children transferring from a public school to a private school would be eligible for the credit.<sup>23</sup> Parents could claim the tuition credit for a qualifying private school, broadly defined as an elementary and secondary school not controlled by a governmental entity.<sup>24</sup> It is important to note that the Original bill did not contain any adjusted gross income<sup>25</sup> limitation on the ability to claim the tuition tax credit.<sup>26</sup> As long as the taxpayer paid the private school tuition of their qualifying dependent child, they could claim the Utah tuition tax credit regardless of their annual income.<sup>27</sup>

The Original bill also included a nonrefundable<sup>28</sup> tax credit against Utah income taxes for contributions to scholarship granting organizations ("SGOs").<sup>29</sup> An SGO is a private

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<sup>21</sup> The credit is fifty percent of \$4,000, which equals \$2,000. Harry's income tax is \$1,000 less the \$2,000 tuition tax credit. As the credit is refundable, Harry winds up with \$1,000 from the State of Utah. Essentially Harry has a negative tax liability to the State of Utah for 2006 of \$1,000.

<sup>22</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005); *contra* Deborah Katz Levi, Comment, *Tuition Tax Credit Proposals in Utah – Their Constitutionality and Feasibility*, 2005 UTAH L. REV. 1047, 1056-57 (2005). Deborah Katz Levi writes that only individuals whose children were already in private schools on January 1, 2005 (or moved into Utah after that date) could claim the tuition tax credit under the original H.R. 39. *Id.* My reading of the Original version of H.R. 39 does not agree with that interpretation of the proposed statute.

<sup>23</sup> Note this would mean the vast majority of Utah's school children would be eligible for the tuition tax credit, as 97 percent of Utah's school children attend public school. Editorial, *Reject Guesswork*, THE SALT LAKE TRIBUNE, December 30, 2004, at A12.

<sup>24</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>25</sup> Adjusted gross income is a federal income tax concept. Generally it is the total of items of income less certain allowed deductions. Internal Revenue Service Form 1040, "U.S. Individual Income Tax Return"; see Sean W. Mullaney, Comment, *More Than Just a Diploma: Roth IRA Conversions Sheltered by the Lifetime Learning Credit*, 14 GEO. MASON L. REV. (forthcoming 2007).

<sup>26</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>27</sup> *Id.*

<sup>28</sup> A nonrefundable tax credit, as opposed to a refundable tax credit, can only reduce a taxpayer's tax to zero, and it cannot create a negative tax liability. If the credit discussed in the previous example was nonrefundable, then Harry's tax for 2006 would be zero, and Harry would not receive \$1,000 from the State of Utah. See Sean W. Mullaney, Comment, *More Than Just a Diploma: Roth IRA Conversions Sheltered by the Lifetime Learning Credit*, 14 GEO. MASON L. REV. (forthcoming 2007).

organization that raises money and provides private scholarships to students to attend private schools.<sup>30</sup> As the Original version was the only one to propose this nonrefundable credit for SGO contributions,<sup>31</sup> this Paper will not discuss this aspect of Utah’s tuition tax credit or analyze its validity under the Constitution.

The First Substitute version of H.R. 39 changed the structure of the proposed tuition tax credit. First, it offered a full credit, as opposed to a fifty percent credit, on eligible amounts of tuition paid to a private school.<sup>32</sup> However this version means-tested the credit’s availability, meaning the ability to claim the credit varied inversely with one’s federal adjusted gross income.<sup>33</sup> The bill allowed a refundable tax credit of up to \$3,750 in tuition paid for taxpayers whose federal adjusted gross income was equal to 100 percent or less of the “maximum annual income allowed to qualify for reduced priced meals for the applicable household size as published by the U.S. Department of Agriculture.”<sup>34</sup> The proposal had a sliding scale for the ability to claim the refundable tuition tax credit based on the household’s adjusted gross income as a percentage of the household’s maximum income for qualifying for federal school meal assistance as follows:<sup>35</sup>

Percentage of federal school reduced price meal assistance maximum income	Maximum Tuition Tax Credit
100% or less	\$3,750
Greater than 100% but less than or equal to 125%	\$3,500

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<sup>29</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>30</sup> Deborah Katz Levi, Comment, *Tuition Tax Credit Proposals in Utah – Their Constitutionality and Feasibility*, 2005 UTAH L. REV. 1047, 1049 (2005).

<sup>31</sup> See Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005); Tuition Tax Credits, H.R. 39 2d Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>32</sup> Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Greater than 125% but less than or equal to 150%	\$3,250
Greater than 150% but less than or equal to 175%	\$3,000
Greater than 175% but less than or equal to 200%	\$2,750
Greater than 200% but less than or equal to 225%	\$2,500
Greater than 225% but less than or equal to 250%	\$1,750
Greater than 250% but less than or equal to 275%	\$1,000
Greater than 275% but less than or equal to 300%	\$500

As observed by Ronnie Lynn of The Salt Lake Tribune, a family of five with an adjusted gross income of \$40,756 qualified for a \$3,750 tuition tax credit, while a family of five with an adjusted gross income of \$112,000 qualified for a \$500 tuition tax credit.<sup>36</sup>

The First Substitute also expanded the number of qualifying students. As long as a student attended a private school, the proposal considered them a qualifying student.<sup>37</sup> In the Original version a student had to switch from a public school to a private school for the parents to claim the credit.<sup>38</sup> Under the First Substitute, parents of students already attending private schools and parents of children who switched to private schools could claim the tuition tax credit, so long as they met the adjusted gross income qualifications.<sup>39</sup>

The First Substitute differed from the Original version in that it had explicit legislative findings.<sup>40</sup> One of these findings was that parents are best equipped to make decisions for their children, including where their child should attend school.<sup>41</sup> Another finding stated that children

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<sup>36</sup> Ronnie Lynn, *New Approach on Tax Credits*, THE SALT LAKE TRIBUNE, January 27, 2005 at B1.

<sup>37</sup> Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>38</sup> Tuition Tax Credits, H.R. 39, 56th Leg., Gen. Sess. (Utah 2005).

<sup>39</sup> Ronnie Lynn, *New Approach on Tax Credits*, THE SALT LAKE TRIBUNE, January 27, 2005 at B1.

<sup>40</sup> Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>41</sup> *Id.*

and families are the primary beneficiaries of the tuition tax credit program, and any benefit to private schools, “sectarian or otherwise, is purely incidental.”<sup>42</sup> The Legislature also found that the bill is “for the valid secular purpose of tailoring a student’s education to that student’s specific needs” and the tuition tax credit program is “neutral with respect to religion.”<sup>43</sup> The findings also state that parents using the program might direct “resources to religious and secular schools solely as a result of their genuine and independent private choices.”<sup>44</sup> The First Substitute, unlike the Original version, contained a \$1,500,000 appropriation from the General Fund to the State Board of Education.<sup>45</sup> The Board would distribute this money to public school districts that “demonstrated measurable financial harm” from the credit’s enactment.<sup>46</sup>

The Second Substitute, the one ultimately defeated in the House, featured many of the same things as the First Substitute. It included the same adjusted gross income limitations on taking the tuition tax credit, the same \$1.5 million appropriation the Board of Education, and the same legislative findings.<sup>47</sup> However, this version restricted the definition of a “qualifying student.”<sup>48</sup> Under the Second Substitute, a qualifying student was someone who meets at least one of the following criteria:

- i. Was born after September 1, 1999;
- ii. Was enrolled as a full-time student in a Utah public school on January 1, 2005;
- iii. Was not a Utah resident on January 1, 2005; or
- iv. Was a private school student for whom a taxpayer paid or incurred the tuition expenses, and the adjusted gross income of the taxpayer was less than or equal to 100% of the income guideline for reduced priced school meals.<sup>49</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Tuition Tax Credits, H.R. 39 2d Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

This new definition of a qualified child prohibited all but the poorest of parents of children already in private school from utilizing the tuition tax credit.<sup>50</sup> This addressed fiscal concerns about allowing all parents of children previously in private schools to take the credit, even subject to the adjusted gross income limitations of the First and Second Substitutes.<sup>51</sup> One estimate put the cost to the Utah fisc of extending the tax credit to all parents with children already in private schools (subject to the adjusted gross income limitations) at \$38 million.<sup>52</sup> As previously noted, the Second Substitute failed in the House of Representatives by a vote of 34 in favor and 40 against.<sup>53</sup>

### III. Tuition Tax Credits and the Establishment Clause

#### a. The Evolving *Lemon* Test

According to the First Amendment, “Congress shall make no law respecting an establishment of religion.”<sup>54</sup> This provision, better known as the Establishment Clause, is how school choice programs, including tuition tax credits, can run afoul of the Constitution.<sup>55</sup> Establishment Clause questions often arise as religiously affiliated schools are among the many private schools available to parents utilizing school choice programs. Since the 1970’s, Supreme Court jurisprudence on the Establishment Clause has not been entirely consistent.<sup>56</sup> One of the leading cases in this area is the Supreme Court’s landmark decision in *Lemon v. Kurtzman*.<sup>57</sup>

In *Lemon* the court invalidated, on Establishment Clause grounds, a Rhode Island statute that supplemented the salaries of teachers in nonpublic (including religious) schools and a

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<sup>50</sup> Ronnie Lynn, *Bill Scales Back Tuition Tax Break*, THE SALT LAKE TRIBUNE, February 9, 2005, at A11.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Utah H.R., 56th Leg., Gen. Sess., Vote Tabulation Tuition Tax Credits (Feb. 25, 2005), available at <http://www.le.state.ut.us/~2005/status/hbillsta/hb0039s2.002h.txt>.

<sup>54</sup> U.S. CONST. amend. I.

<sup>55</sup> *E.g.*, Sedler, *supra* note 6; Levi, *supra* note 6, at 1051.

<sup>56</sup> Hutchison, *supra* note 6, at 605 (observing that “[w]hether [the Supreme Court] has always preserved the consistency it desires [in Establishment Clause jurisprudence] is debatable”).

<sup>57</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Sedler, *supra* note 6, at 1319.



Pennsylvania statute that directly reimbursed nonpublic (including religious) schools for expenditures for things such as teacher salaries, textbooks, and instructional materials.<sup>58</sup> In doing so, the court laid out a three-pronged test for whether a statute violates the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' (citations omitted).<sup>59</sup>

In *Lemon*, the court held that the statutes in question did have a secular purpose, namely, improving the quality of all education in their states.<sup>60</sup> The court indicated it would be deferential to the States when determining if statutes had valid secular legislative intent.<sup>61</sup> The court passed on the second prong, but held that these direct state payments to religious schools constituted an excessive entangling of religion and government.<sup>62</sup>

Over the past thirty-five years, Supreme Court jurisprudence refined and fine-tuned the *Lemon* test. Writing for the majority in *Agostini v. Felton* in 1997, Justice Sandra Day O'Connor wrote that the third prong of the *Lemon* test (excessive government entanglement) has mostly been used to analyze *Lemon*'s second prong, whether or not the statute advances or inhibits religion.<sup>63</sup> Justice Clarence Thomas later put the final nail in the coffin of a separately standing third prong of the *Lemon* test in *Mitchell v. Helms*.<sup>64</sup> Justice Thomas wrote that test for determining whether a statute violates the Establishment Clause is really just the first two prongs of the *Lemon* test, i.e., secular legislative purpose and advancing or inhibiting religion.<sup>65</sup> The original third prong is really just a sub-prong of the advancing or inhibiting religion test.<sup>66</sup> Justice

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<sup>58</sup> *Lemon*, 403 U.S. at 607, 609-11.

<sup>59</sup> *Id.* at 612-13.

<sup>60</sup> *Id.* at 613.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 613-14.

<sup>63</sup> *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997); *Levi*, *supra* note 6, at 1052.

<sup>64</sup> *Mitchell v. Helms*, 530 U.S. 793, 807 (2000).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Thomas laid out a rule for determining when “government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”<sup>67</sup>

Whether or not a statute advances religion is now of primary importance in Establishment Clause jurisprudence, particularly in the educational realm. First, for political reasons, few legislatures are going to pass laws inhibiting private religious schools. Second, a long line of Supreme Court cases have held that when analyzing the first *Lemon* prong, secular purpose, the state legislature must be afforded a wide range of deference: if any secular purpose can be found for the statute, it will pass *Lemon*’s first prong.<sup>68</sup>

b. *Zelman*

*Zelman v. Simmons-Harris*, decided in 2002, is the Supreme Court’s most recent comprehensive treatment of a school choice program under the Establishment Clause.<sup>69</sup> *Zelman* considered the validity of an Ohio school voucher program for parents and children in Cleveland.<sup>70</sup> Cleveland’s public schools had been among the worst in the nation for more than a generation, and students in Cleveland’s public schools performed much worse than their peers in other Ohio public schools.<sup>71</sup> Among other disheartening statistics, more than two-thirds of public high school students dropped or failed out before graduation.<sup>72</sup>

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<sup>67</sup> *Id.* at 808 (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

<sup>68</sup> *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (stating “[l]ittle time need be spend on the question of whether the Minnesota tax deduction has a secular purpose” and concluding that the Court is reluctant to attribute unconstitutional motives to the States when plausible secular purposes can be gleaned from the statute); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (holding that a New York tax credit program for private school tuition had the valid secular purpose of improving education); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (holding that Rhode Island and Pennsylvania programs of payments directly to private schools, including religious schools, had the valid secular purpose of enhancing the quality of secular education in all schools, and noting the Court will generally grant a fair amount of deference on the secular purpose prong).

<sup>69</sup> *Zelman v. Simmons-Harris*, 539 U.S. 639 (2002); *see Hutchison, supra* note 6, at 560.

<sup>70</sup> *Zelman*, 539 U.S. at 644.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Under the Ohio school choice program, only parents in the Cleveland school district qualified for a school voucher.<sup>73</sup> Parents could use the voucher at any private school that decided to participate in the program, including religious and nonreligious schools.<sup>74</sup> Schools could participate so long as the school agreed to certain conditions, such as not teaching hatred and not discriminating based on race, ethnicity, religion or national origin.<sup>75</sup> Public schools adjacent to Cleveland could also elect to participate in the program.<sup>76</sup>

School vouchers were distributed to parents for their children based upon financial need.<sup>77</sup> Families with incomes of 200% and below the federal poverty line received ninety percent of tuition up to a cap of \$2,250, while all other families received seventy-five percent of tuition costs, up to a cap of \$1,875.<sup>78</sup> Those parents who chose to keep their children in Cleveland's public schools could utilize vouchers for costs associated with tutors for their students.<sup>79</sup> Ohio reimbursed poor parents for ninety percent of tutoring costs, up to a cap of \$360, while all other parents received a seventy-five percent reimbursement.<sup>80</sup>

As part of the effort to improve education in the city, Cleveland started a community school program.<sup>81</sup> Community schools are publicly funded schools that operate independent of the normal state educational bureaucracy and must accept students by lottery.<sup>82</sup> Additionally, magnet schools, public schools "that emphasize a particular subject area, teaching method, or service to students" were established in Cleveland as part of the plan to improve the quality of

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<sup>73</sup> *Id.* at 644-45.

<sup>74</sup> *Id.* at 645.

<sup>75</sup> *Id.*

<sup>76</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

<sup>77</sup> *Id.* at 646.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002).

Cleveland's education.<sup>83</sup> Fifty-six private schools participated in the Cleveland school voucher program, while no public schools adjacent to Cleveland elected to participate.<sup>84</sup> Forty-six of the private schools (eighty-two percent) had a religious affiliation.<sup>85</sup> More than 3,700 students participated in the voucher program, and most (ninety-six percent) enrolled in a religiously affiliated school.<sup>86</sup>

Analyzing this program under the Establishment Clause, the late Chief Justice William Rehnquist used the two-pronged version of the *Lemon* test announced in *Agostini*.<sup>87</sup> In *Zelman* there was no dispute as to whether the Ohio voucher program violated the first prong (secular purpose) of the *Lemon* test.<sup>88</sup> The program served the valid secular purpose of providing educational assistance to children in a failing public school system.<sup>89</sup> Hence the Court only analyzed the "effect" prong, i.e., whether the program had the purpose or effect of advancing or inhibiting religion.<sup>90</sup>

The fact that this program was not direct aid to religious schools proved important in the Supreme Court's analysis.<sup>91</sup> Chief Justice Rehnquist noted that there is an important difference between direct aid to religious schools and "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."<sup>92</sup> Citing *Mueller v. Allen*, *Witters v. Washington Dept. of Servs. for the Blind*, and *Zobrest v. Catalina Foothills School Dist.*, Chief Justice Rehnquist noted:

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 647.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 648-49 (citing *Agostini v. Felton*, 521 U.S. 203, 222-23).

<sup>88</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 649.

<sup>92</sup> *Id.* (citations omitted).

Our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct that aid to religious schools or other institutions of their own choosing. Three times we have rejected such challenges.<sup>93</sup>

Cases such as *Mueller*, *Witters*, and *Zobrest* illustrate useful principles in analyzing statutes challenged under the Establishment Clause. In *Mueller* the Court rejected a challenge to a Minnesota program authorizing a tax deduction for private school tuition, even though ninety-six percent of the program's beneficiaries attended religiously affiliated schools.<sup>94</sup> The Court in *Mueller* stated that it was irrelevant to the Establishment Clause analysis that the vast majority of benefiting parents chose religiously affiliated schools.<sup>95</sup> Relevant factors included that religious schools only benefited after numerous private choices by parents and that the program gave "no imprimatur of state approval" to any one religion or religion in general.<sup>96</sup>

*Witters*, upholding a tuition aid program that a student used to attend a religious institution to become a pastor, also supports the principle that if, when looking at the state program as a whole, the "aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices" then the program does not have the purpose or effect of advancing religion.<sup>97</sup> In *Zobrest* the Court rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf-children in religious schools.<sup>98</sup> The Court held that "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 649-50.

<sup>95</sup> *Id.* at 650.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 650-51 (quoting *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 487 (1986)).

<sup>98</sup> *Id.* at 651.

Establishment Clause challenge.”<sup>99</sup> The Court noted this program distributed benefits neutrally to any child classified as “disabled.”<sup>100</sup>

After reviewing these three cases, Chief Justice Rehnquist elucidated a rule:

Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.<sup>101</sup>

The Court upheld the validity of the Ohio program under the Establishment Clause.<sup>102</sup>

The majority held this plan was neutral in all aspects with respect to religion.<sup>103</sup> The only preference shown in this program was toward lower income families (who received a greater degree of financial assistance) and the program had no financial incentive toward religious schools.<sup>104</sup> Additionally, the Ohio program permitted parents to choose among options that are private and public, secular and religious, and thus it was a program of true private choice.<sup>105</sup>

In upholding the Ohio school voucher program, the Court distinguished it away from the facts of *Comm. for Pub. Educ. And Religious Liberty v. Nyquist* where the Supreme Court, in 1973, invalidated a New York tax credit for parents of students attending private schools.<sup>106</sup> The Court noted that the challenged New York law in *Nyquist* sought to give financial support for struggling private schools.<sup>107</sup> Further, the New York program flatly excluded students in public schools, while the Ohio program included both private and public school students.<sup>108</sup> The Court

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<sup>99</sup> *Id.* (quoting *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993)).

<sup>100</sup> *Id.* (citing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993)).

<sup>101</sup> *Id.* at 652.

<sup>102</sup> *Id.* at 644.

<sup>103</sup> *Id.* at 653.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 662.

<sup>106</sup> *Id.* at 661.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

emphasized the multitude of choices available to Cleveland parents in upholding the Ohio school voucher program.<sup>109</sup>

c. Tuition and Taxes: Two Supreme Court Analyses

Two Supreme Court cases mentioned in *Zelman* bear some discussion in order to properly analyze Utah's tuition tax credit proposals under the Establishment Clause: *Mueller v. Allen*<sup>110</sup> and *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*.<sup>111</sup> In *Mueller*, the Supreme Court considered, and upheld, a Minnesota tax deduction for tuition paid for elementary and secondary school tuition.<sup>112</sup> Parents with students in both public and private schools could deduct tuition and other related costs for Minnesota income tax purposes.<sup>113</sup> First the Court quickly handled the first prong of the *Lemon* test, stating that Minnesota's decision to defray costs incurred by parents for their children's schooling evidences a purpose that is both secular and reasonable.<sup>114</sup> The Court also upheld the tax deduction under *Lemon*'s second prong, noting both that the tax deduction was broadly available to all parents<sup>115</sup> (i.e., parents of both public and private school children) and that any benefits accruing to private schools, including religious schools, was the result of many independent choices by parents.<sup>116</sup>

In *Nyquist*, a 1973 case, the Supreme Court held a New York state tax benefit for the parents of private school students violated the Establishment Clause, specifically the second prong of the *Lemon* test.<sup>117</sup> The New York law allowed parents with incomes under \$25,000 who had children attending nonpublic schools to deduct a set amount (according to a statutory table)

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<sup>109</sup> *Id.* at 662.

<sup>110</sup> *Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>111</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

<sup>112</sup> *Mueller*, 463 U.S. at 391.

<sup>113</sup> *Id.* at 397.

<sup>114</sup> *Id.* at 395.

<sup>115</sup> *Id.* at 397.

<sup>116</sup> *Id.* at 399.

<sup>117</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973).

from income for New York State tax purposes.<sup>118</sup> The deductible amount had nothing to do with the actual tuition paid: so long as the parent had a child in a nonpublic school, the parent could deduct the statutorily prescribed amount.<sup>119</sup> The program did not allow deductions for parents with children in public schools.<sup>120</sup>

While the Court ultimately invalidated this law, it ruled that this tax deduction did not violate the first prong of the *Lemon* test. Justice Lewis Powell, writing for the Court, found valid secular purposes, including promoting diversity in the educational system and concern for an overburdened public school system.<sup>121</sup> The second prong presented a serious problem for the New York statute.<sup>122</sup> Justice Powell found the questioned statute aimed to keep parents sending their children to religious schools.<sup>123</sup> Justice Powell also found that another significant purpose of the statute was to provide financial support for struggling private schools.<sup>124</sup> These conclusions led the Supreme Court to find the New York program violated the second prong of the *Lemon* test, namely that the statute had a “primary effect that advances religion.”<sup>125</sup>

#### d. Distinctions Among Taxpayers and the Equal Protection Clause

The Fourteenth Amendment to the Constitution states, in part, “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>126</sup> The Equal Protection Clause applies to distinctions among taxpayers made by state tax laws.<sup>127</sup> However, the Supreme Court is rather deferential to state legislatures in determining valid distinctions in

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<sup>118</sup> *Id.* at 790.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 773.

<sup>122</sup> *Id.* at 794.

<sup>123</sup> *Id.* at 783.

<sup>124</sup> *Id.* at 795.

<sup>125</sup> *Id.* at 798.

<sup>126</sup> U.S. CONST. amend. XIV, § 1.

<sup>127</sup> *E.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).



state taxation,<sup>128</sup> and unless the distinction serves no legitimate state interest,<sup>129</sup> the Court will usually deem it valid under the Equal Protection Clause.

*Madden v. Commonwealth of Kentucky* is a leading case for the proposition that the Court will grant state legislatures a sizeable amount of deference when making distinctions among taxpayers.<sup>130</sup> The court explained that “[t]raditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden.”<sup>131</sup> In *Madden* the Court upheld a statute that placed an ad valorem tax on bank deposits outside Kentucky of fifty cents per \$100 and a ten cents per \$100 on deposits in Kentucky.<sup>132</sup> The Court found that difficulties in collecting taxes on out-of-state accounts rationally justified the much higher tax rate on out-of-state accounts, and thus held the distinction between in and out-of-state accounts for tax purposes valid under the Equal Protection Clause.<sup>133</sup>

Drastic differences in tax liabilities for similarly situated taxpayers can pass muster under the Equal Protection Clause so long as there is a “plausible policy reason” for the differing tax classifications.<sup>134</sup> In *Nordlinger v. Hahn* the Supreme Court upheld California’s famous Proposition 13, a law that capped the annual increase in assessed home value at two percent annually.<sup>135</sup> The state could only increase the assessed value to fair market value when the house changed hands.<sup>136</sup> This meant long-term home owners paid much less in taxes than more recent buyers of similar homes.<sup>137</sup> The appellant claimed having bought her house in November 1988,

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<sup>128</sup> *E.g.*, *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88 (1940).

<sup>129</sup> John E. Nowak & Ronald D. Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. DAVIS L. REV. 273, 302 (1987).

<sup>130</sup> *Madden*, 309 U.S. at 88.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 86.

<sup>133</sup> *Id.* at 88-89.

<sup>134</sup> *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

<sup>135</sup> *Id.* at 5.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 7.

she would pay about \$19,000 in property taxes over the ten years starting with 1989.<sup>138</sup> Her neighbor, who purchased a comparable home in 1975, would only pay about \$4,100 in property taxes over the same period.<sup>139</sup>

Despite this large disparity in the property tax paid by similarly situated taxpayers, the Court held Proposition 13 valid under the Equal Protection Clause.<sup>140</sup> The Court found two legitimate State interests to uphold the distinction.<sup>141</sup> First, California had a legitimate interest in maintaining stable neighborhoods with limited turnover, and limiting increases in property taxes rationally served that purpose.<sup>142</sup> Second, California had a legitimate interest in having existing homeowners not be harmed by two and three fold increases in the value of their homes (which happened in parts of California in the 1970s<sup>143</sup>), and Proposition 13's cap on increases in the assessed value rationally served that interest.<sup>144</sup> The cap allowed homebuyers to accurately predict their future property tax liabilities before purchasing a home and the Court noted reliance interests are usually highly valid and not a violation of the Equal Protection Clause.<sup>145</sup> Further, it is equitable to protect homeowners from paying taxes on large unrealized paper gains in the value of their homes.<sup>146</sup>

While courts afford state tax distinctions a large amount of deference, they are not always valid under the Equal Protection Clause.<sup>147</sup> For example, in *Williams v. Vermont* the Court struck down a Vermont tax credit for sales taxes paid to other states on out of state personal property

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 13.

<sup>141</sup> *Id.* at 12.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Id.* at 12.

<sup>145</sup> *Id.* at 12-13.

<sup>146</sup> RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 635 (7th ed. 2003) (quoting *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, West Virginia*, 488 U.S. 336 (1989)).

<sup>147</sup> *E.g.*, *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

purchases when the statute granted the credit only to taxpayers who were residents of Vermont at the time of the purchase.<sup>148</sup> This meant that if Taxpayer A, a Vermont resident, bought a car out-of-state on January 1<sup>st</sup> and paid an out-of-state sales tax, he did not have to pay the Vermont use tax.<sup>149</sup> However, if Taxpayer B, an out-of-state resident on January 1<sup>st</sup>, bought the same car in the same state and paid the same tax on January 1<sup>st</sup>, and then moved to Vermont on February 1<sup>st</sup>, he would also have to pay the Vermont use tax.<sup>150</sup>

The Court held that this tax credit made a distinction between resident and nonresident taxpayers that served no legitimate state interest.<sup>151</sup> The use tax went into a fund for the repair and maintenance of Vermont highways.<sup>152</sup> The Court noted that the distinction between taxpayers (whether or not they were a resident when the out-of-state purchase was made) bore no rational relation to the statutory purpose of the tax (raising money for highways).<sup>153</sup>

Distinctions among taxpayers based on past differences can also violate the Equal Protection Clause.<sup>154</sup> In *Hooper v. Bernalillo County Assessor*, the Supreme Court invalidated a New Mexico \$2,000 property tax exemption for those Vietnam veterans who resided in New Mexico before May 8, 1976.<sup>155</sup> This meant that a Vietnam veteran who moved to New Mexico in 1981 did not qualify for the tax exemption, while veterans who resided in the state before the statutory date received the exemption.<sup>156</sup>

The Court ruled that the distinction made by the statute bore no rational relation to encouraging veterans to move to the state and there was no evidence that veterans who moved to

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<sup>148</sup> *Williams*, 472 U.S. at 22.

<sup>149</sup> *See id.* at 15.

<sup>150</sup> *See id.*

<sup>151</sup> *Id.* at 23.

<sup>152</sup> *Id.* at 18.

<sup>153</sup> *Id.* at 24. Note that the majority opinion specifically stated that this case was not decided “right to travel” grounds. *Id.* at 27.

<sup>154</sup> *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

<sup>155</sup> *Id.* at 614.

<sup>156</sup> *Id.* at 615.

New Mexico before May 8, 1976 were more deserving of a property tax exemption than veterans who moved to the state after May 8<sup>th</sup>.<sup>157</sup> Further, this amounted to a continuing tax benefit for living in New Mexico long after 1976 solely based on living in the state before May 8, 1976.<sup>158</sup> The statute's wording also allowed for veterans who lived in New Mexico as infants, later served in Vietnam, and then moved back to New Mexico long after 1976 to claim the credit (as they had been "residents" of the state before May 8, 1976).<sup>159</sup> Based on these facts, the Court ruled that the statute violated the Equal Protection Clause by creating two classes of resident Vietnam veterans in New Mexico, based on residency before and after May 8, 1976, for no legitimate state interest.<sup>160</sup>

#### IV. The Validity of Utah's Tuition Tax Credit Proposal Under the Constitution

##### a. Establishment Clause Analysis

This subpart will first analyze the tuition tax credit proposals in light of the *Zelman* decision, and then it will compare and contrast the Utah proposals to the facts in *Mueller* and *Nyquist*.

##### 1. The Utah Proposals Under *Zelman*

First, the Utah proposals satisfy the first *Lemon* test, namely, it has valid secular purposes. Secular purposes for the proposals include wanting to empower parents to make the best choice for their children's education<sup>161</sup> and ensuring that Utah's public schools are not swamped with growing numbers of students.<sup>162</sup> So long as the court can find a valid secular

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<sup>157</sup> *Id.* at 619, 622.

<sup>158</sup> *Id.* at 621.

<sup>159</sup> *Id.* at 622.

<sup>160</sup> *Id.* at 623.

<sup>161</sup> Tuition Tax Credits, H.R. 39 1st Substitute, 56th Leg., Gen. Sess. (Utah 2005); Tuition Tax Credits, H.R. 39 2d Substitute, 56th Leg., Gen. Sess. (Utah 2005).

<sup>162</sup> Royce Van Tassell, Position Paper for Tuition Tax Credits, *in* Utah State Univ., Estimating Demand and Supply Response to Tuition Tax Credits for Private School Tuition in Utah 79 (Nov. 1, 2004) available at: <http://www.edxutah.org/pdfs/FinalDraft-pdfformat1.pdf> (last visited Mar. 20, 2006).

purpose, the court will give great deference to legislatures on this test,<sup>163</sup> and there is no reason to believe the court would not afford these tuition tax credit proposals that deference.<sup>164</sup>

*Zelman* provides the most important rules for analyzing the validity of the 2005 Utah tuition tax credit proposals under the second prong of *Lemon*. In order for the proposals to not advance or inhibit religion, and thus to be valid under the Establishment Clause, they must: (1) be neutral with respect to religion; (2) provide assistance to a broad class of individuals; and, (3) direct government aid to religious schools as a result of genuine and independent private choices.<sup>165</sup>

All three of the proposals are neutral with respect to religion. They allow parents to claim tuition tax credits at a broad array of private schools. There are at least 118 private schools in Utah, and about seventy of them are not religiously affiliated.<sup>166</sup> Of the at least forty-eight that are religiously affiliated, they represent a variety of religions: fifteen are Roman Catholic, three are Mormon,<sup>167</sup> twenty-nine are other Christian denominations, and one is Islamic.<sup>168</sup> There is also at least one Jewish private school in Utah.<sup>169</sup> As Utah's tuition tax credits proposals could

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<sup>163</sup> *E.g.*, Committee for Public Education and Religious Liberty v. Nyquist, 413 US 756, 773 (1973).

<sup>164</sup> Levi, *supra* note 6, at 1054 (arguing that the 2005 tuition tax credit proposals are invalid under the Establishment Clause but noting that they would satisfy the first prong of the *Lemon* test).

<sup>165</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>166</sup> Celia R. Baker, *Private Schools, Public Issues*, THE SALT LAKE TRIBUNE, January 9, 2006 B1.

<sup>167</sup> While Mormons still constitute a majority of Utah's population, that percentage is dropping due largely to an influx of non-Mormons. Matt Canham, *Mormons In Utah: The Shrinking Majority*, THE SALT LAKE TRIBUNE, July 24, 2005, at A1. While the Mormon population grew from about 1.2 million in 1989 to about 1.5 million in 2004, the proportion of Mormon's in Utah slipped from 70.4% in 1989 to 62.4% due to an influx of non-Mormons. *Id.* Considering that Mormons are still a large majority of Utah's population, that there are only three Mormon private elementary and secondary schools is at first glance surprising. However, in Utah students can attend Mormon facilities for religious instruction which are often located adjacent to public schools. Editorial, *Reject Guesswork*, The Salt Lake Tribune, Dec. 30, 2004, at A12. A 1952 Supreme Court case, *Zorach v. Clauson*, allows programs where public schools release children during the school day to attend religious instruction at religious sites that are near the public school. *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>168</sup> Celia R. Baker, *Private Schools, Public Issues*, THE SALT LAKE TRIBUNE, January 9, 2006, at B1.

<sup>169</sup> Utah State Univ., Estimating Demand and Supply Response to Tuition Tax Credits for Private School Tuition in Utah 144 (Nov. 1, 2004) available at: <http://www.edexutah.org/pdfs/FinalDraft-pdfformat1.pdf> (last visited Mar. 20, 2006).

support nonreligious private schools, and private schools of various religions, the proposals are neutral with respect to religion.

All three proposals provide assistance to a broad class of individuals. Ninety-seven percent of Utah's school children attend public schools.<sup>170</sup> Under all three proposals, parents of children already in public schools could take advantage of tuition tax credit, so long as they were below certain income levels under the First and Second Substitutes.<sup>171</sup> While the program in *Zelman* offered all parents some level of assistance, it does not appear that the *Zelman* court required that all parents receive assistance, and Utah's legislature means-testing the benefit seems like a reasonable step to equitably spread the benefits of the tuition tax credit. The program in *Zelman* did offer reimbursement for public as well as private school costs,<sup>172</sup> while the Utah proposals only offer reimbursement for private school costs.<sup>173</sup> However, in Utah public schools do not charge tuition,<sup>174</sup> and charter schools statutorily cannot charge tuition.<sup>175</sup> It is unreasonable to argue that either the Utah proposals fail under the Establishment Clause because they do not provide a tax credit for non-existent public school tuition (essentially a meaningless tax credit) or that the tax credit would pass muster, but only if Utah's public schools charged tuition. The Constitutionality of a school choice tuition should not turn on whether or not the public schools charge tuition.

The Utah tuition tax credit proposals also direct aid to religious schools only as a result of genuine and independent choices by parents. Much like the school voucher program in *Zelman* did not constitute the government making direct payments to religious schools; the tuition tax

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<sup>170</sup> Celia R. Baker, *Private Schools, Public Issues*, THE SALT LAKE TRIBUNE, January 9, 2006, at B1.

<sup>171</sup> *Supra* Part II.

<sup>172</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

<sup>173</sup> *Supra* Part II.

<sup>174</sup> *Levi*, *supra* note 6, at 1057.

<sup>175</sup> UTAH CODE ANN. § 53A-1a-507(2) (2000).

credit funnels money to Utah parents who then might choose to send their children to religious schools. Utah's public school parents could choose among free public schools, an increasing number of tuition free charter schools<sup>176</sup>, and various private schools, both religious and secular. In *Zelman* parents could choose among public, community, magnet, and private (secular and religious) schools, and those parents keeping their children in public schools could benefit from tutoring vouchers.<sup>177</sup> The Supreme Court deemed this a genuine and independent choice, and under the Utah proposals, parents would have a variety of choices. Further, much like in *Zelman*, the tuition tax credits offered no financial incentive to choose a religious school over a charter school, public school, or secular private school. While the Utah proposals do not have the tutor reimbursement program that the *Zelman* featured, the second two proposals offered \$1.5 million in aid only to public schools who demonstrate harm from the tuition tax credit regime. Further, the Court in *Zelman* did not state that all of the elements of the Ohio program were necessary for the program to pass muster under *Lemon*'s second prong, and it is not likely *Zelman* would have turned out differently if Ohio had not offered the tutoring reimbursement component.

## 2. The Utah Proposals Compared to *Mueller* and *Nyquist*

In *Mueller*, the Court upheld a tax deduction for tuition and other costs related to private and public school attendance.<sup>178</sup> Similar to the *Mueller* tax deduction, benefits accruing to any religious school under the tuition tax credit proposals would only occur after parents choose (1) to take their child out of a public school and then (2) to put their child in a religious school. Parents in both Minnesota and Utah might keep their children in public schools or might put them in secular, nonreligious private schools. Much like the *Mueller* tax deduction encouraged

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<sup>176</sup> Tiffany Erickson, *Charters Booming*, DESERET MORNING NEWS, December 13, 2005 (observing that in 2005 there were thirty-six charter schools in Utah with nearly 12,000 students, while it is estimated that in 2006 there will be more than fifty charter schools in Utah with about 15,000 students).

<sup>177</sup> *Supra* Part III.B.

<sup>178</sup> *Mueller v. Allen*, 463 U.S. 388, 391 (1983).

private, independent choices, the Utah proposals would result in parental choices among a variety of religious and nonreligious options. The Utah tuition tax credit proposals are also neutral with respect to religion, and much like the deduction *Mueller*, the proposed credit made no distinction between religious and secular schools.

In *Nyquist*, the Court concluded that New York impermissibly designed the tax credit program to benefit private schools, including religious schools.<sup>179</sup> The proposed Utah program's design primarily benefits parents, students, and the public school system by reducing the strain on the system.<sup>180</sup> Further, the continuing validity of *Nyquist* is in at least some doubt. While the *Zelman* court cited *Nyquist* and did not overturn it,<sup>181</sup> in some ways the majority is at odds with *Nyquist*,<sup>182</sup> unless one believes skillfully framing the purposes of the statute is essential to validity under the Establishment Clause. The substance of the programs in *Zelman* and *Nyquist* are not that different: both include government aid to schools that happens as a result of parental choice. *Nyquist* is over thirty years old, and is probably at best a good exposition of the law when a statute intends to benefit private schools.

#### b. Equal Protection Clause Analysis

This analysis will begin by briefly considering the Equal Protection Clause implications of the adjusted gross income limitations on taking the proposed Utah tuition tax credits, and then it will consider the implications of the proposals' different definitions of "qualifying student."

The First and Second Substitutes means-test the benefit of the tuition tax credit, i.e., the lower the parents' income, the higher the higher the possible tuition tax credit.<sup>183</sup> This does not

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<sup>179</sup> Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795 (1973).

<sup>180</sup> *Supra* Part II.

<sup>181</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 661 (2002).

<sup>182</sup> *Id.* at 698, n.7 (Souter, J., dissenting) (noting that at least part of the majority's reasoning was rejected in *Nyquist*).

<sup>183</sup> *Supra* Part II.



create an Equal Protection Clause problem. The federal government has a progressive tax system, as low income individuals pay taxes at a very low rate, and as taxable income increases, the income tax rates increase, to a current maximum of thirty-five percent.<sup>184</sup> Many states also have progressive tax rates.<sup>185</sup> Fundamental fairness and equity are compelling state interests justifying treating upper income taxpayers different from poorer taxpayers, as upper income taxpayers generally can bear the burden of higher taxes in a more equitable way than low income taxpayers. Further, the educational assistance program in *Zelman* was progressive, as poorer parents received an increased voucher amount.<sup>186</sup> The *Zelman* court did not consider an Equal Protection challenge to the Ohio school voucher program.

The definition of “qualifying student” does have Equal Protection Clause implications. Recall that the First Substitute contained no restrictions on the definition of a qualifying child, but the Original version and the Second Substitute excluded most children who were in private school on January 1, 2005.<sup>187</sup> The Second Substitute did provide that students who were in private school on January 1, 2005 could qualify, but only if their parents’ adjusted gross income was 100 percent or less of the federal reduced meal income eligibility guidelines.<sup>188</sup> The First Substitute had no such restriction: almost any child attending private school, regardless of where they attended school on January 1, 2005, was a “qualifying child.”<sup>189</sup>

An example will help illustrate the Equal Protection Clause issue. Imagine that in 2005 the Utah Legislature enacted the refundable tuition tax credit of the Second Substitute. Imagine two children, Kyle and Eric. Both were born on January 1, 1998 and live in Utah. On January 1,

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<sup>184</sup> I.R.C. § 1.

<sup>185</sup> *E.g.*, UTAH CODE ANN. § 59-10-104 (2004) (Utah’s income tax rates start at 2.3% and increase to 7.0%); VA. CODE ANN. § 58.1-320 (West 2005) (Virginia’s income tax rates start at 2% and increase to 5.75%).

<sup>186</sup> *Supra* Part III.B.

<sup>187</sup> *Supra* Part II.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

2005, Kyle attended Public School A, while Eric attended Private School B. On January 1, 2006, Private School B goes out of business, so Eric transfers to Public School A. On July 1, 2008 both Kyle's and Eric's parents, wanting their children to receive a better education, transfer their children to Private School C. In 2009, both sets of parents pay \$3,250 in tuition to Private School C. Kyle and Eric are both only children and are dependents of their mother and father. Kyle's and Eric's parents both have an adjusted gross income of \$41,459 in 2009, which is 135 percent of the federal income guidelines for reduced school meals.<sup>190</sup>

Since Kyle attended public school in Utah on January 1, 2005, in 2009 his parents can claim a refundable tuition tax credit of \$3,250 for Utah income tax purposes under the Second Substitute, as that is the maximum credit allowed for adjusted gross incomes in the 125 to 150 percent of income eligibility guideline range.<sup>191</sup> Eric's parents, similarly situated to Kyle's parents in 2009, are unable to claim the tuition tax credit, as Eric was in private school on January 1, 2005. Under this scenario, Eric's parents pay Utah \$1,402 in tax for 2009, while Kyle's parents pay no income tax and receive \$1,848 from the state of Utah.<sup>192</sup> While this

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<sup>190</sup> This Comment, for simplicity and illustrative purposes only, uses the Department of Agriculture Income Eligibility Guidelines effective as July 1, 2006 as a reasonable proxy for the guidelines in effect for 2009. Under these guidelines, the income eligibility guideline for a family of three for reduced priced meals is \$30,710. Child Nutrition Programs—Income Eligibility Guidelines, 71 Fed. Reg. 13338 (Mar. 15, 2006), available at <http://www.fns.usda.gov/cnd/Governance/notices/iegs/IEG06-07.pdf>. Doing the math ( $\$30,710 \times 135\%$ ) yields an adjusted gross income of \$41,459.

<sup>191</sup> *Supra* Part II.

<sup>192</sup> The following computation uses 2005 tax amounts and law as a reasonable proxy for 2009 amounts. The purpose of this analysis is to illustrate the differences in Utah treatment between two similarly situated taxpayers, not to offer a precise computation of federal and Utah 2009 tax liabilities.

Under Utah's tax laws, Utah taxpayers can deduct half of their federal taxes paid in determining their Utah taxable income. UTAH CODE ANN. § 59-10-114(2)(b)(i) (2004). Thus we must compute Eric's and Kyle's federal income tax before we compute their Utah income tax. Their adjusted gross income is \$41,459, and they get to deduct \$10,000 as a standard deduction, assuming they file a joint return. Rev. Proc. 2004-71, 2004-50 I.R.B. 970. They also get to deduct \$9,600 for three person exemptions. *Id.* The math leads to a federal taxable income of \$21,859 ( $\$41,459 - \$10,000 - \$9,600$ ). Under the rates in place in 2005, their parents pay a 10% tax on the first \$14,600 and a 15% rate on the rest. Rev. Proc. 2004-71, 2004-50 I.R.B. 970. Their federal income tax, before the child tax credit is thus \$2,549 ( $(\$14,600 \times 10\%)$  plus  $(\$21,859 - \$14,600) \times 15\%$ ) equals \$2,549). Under section 24 of the Internal Revenue Code, the parents can claim a \$1,000 child tax credit, so their total federal income tax is \$1,549, I.R.C. § 24. Now we can compute Eric and Kyle's parents' Utah taxes in a world without the Second Substitute. As previously mentioned, they can deduct half of their federal income taxes (\$774) from their Utah taxable income ( $\$1,549 \times$

example dealt only with the Second Substitute, a rather similar inequitable result would happen under the Original version: Eric's parents pay \$1,402 in Utah income taxes, while Kyle's parents pay no tax and receive \$223 from Utah.<sup>193</sup>

As seen in *Nordlinger*, statutes creating large differences in taxes paid by similarly situated taxpayers are not per se invalid, but there must be some rational purpose for the difference.<sup>194</sup> The purposes of the tuition tax credit included empowering parents to make the best educational decision for their children and to help alleviate the burden on the Utah public schools.<sup>195</sup> The distinction between Kyle's and Eric's parents in 2009, based on where their sons attended school in 2005, in no rational way advances the purposes of the statute. This is very different than the situation in *Nordlinger*, where concerns over the stability of neighborhoods and the inequity of having to pay massive property tax hikes on unrealized appreciation in home values were valid state interests rationally related to the distinction created by Proposition 13.<sup>196</sup>

The substantial difference in tax treatment between Kyle's parents and Eric's parents is not the equitable distribution of the tax burden the Supreme Court supported in *Madden*.<sup>197</sup> It is entirely inequitable to have Kyle's parents pay negative income taxes while Eric's parents pay \$1,400 in taxes based on where their children attended school four years earlier. The Court

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50%). UTAH CODE ANN. § 59-10-114(2)(b)(i) (2004). They can also deduct the same standard deduction they used for federal income tax purposes (\$10,000). UTAH CODE ANN. § 59-10-104.1(1)(b) (2004). Additionally, they can claim personal exemptions of \$7,200 (\$2,400 per person). Utah State Tax Commission, *Individual Income Tax: TC-40 Forms and Instructions* 6 (2005), available at <http://tax.utah.gov/forms/current/tc-40inst.pdf>. This leads to a Utah taxable income of \$23,845 (\$41,459-\$774-\$10,000-\$7,200). Under Utah law, their income tax will be \$362 plus seven percent of their income over \$8,626. UTAH CODE ANN. § 59-10-104(3) (2004). The math yields a 2009 Utah income tax of \$1,402 (\$362 X ((\$23,845-\$8,626) X 7%).

This is what Eric's parents pay in Utah income taxes. Under the Second Substitute, Kyle's parents can claim a \$3,250 refundable tuition tax credit; hence they pay no Utah income tax in 2009 and receive \$1,848 (\$3,250 minus \$1,402) from Utah.

<sup>193</sup> The Original version only offered a 50 percent tax credit, so Kyle's parents, instead of owing \$1,402 in Utah taxes, receive \$223 from the state in 2005 (\$1,625 (fifty percent of tuition paid) minus \$1,402).

<sup>194</sup> *Supra* Part III.D.

<sup>195</sup> *Supra* Part II.

<sup>196</sup> *Supra* Part III.D.

<sup>197</sup> *Id.*

usually looks to the purpose of the statute to find a substantial state interest to justify a distinction in similarly situated taxpayers.<sup>198</sup> The proposed distinction between Kyle's parents and Eric's parents is similar to the distinction between Vermont residents and non-residents purchasing out-of-state property the Court struck down in *Williams*.

The Court also disfavors distinctions between similarly situated taxpayers based upon status on or after a certain date when the distinction serves no rational relationship to the statute's purpose. The Original version's and Second Substitute's distinction based on whether Kyle and Eric attended private school on January 1, 2005 is similar to New Mexico's residency distinction in *Hooper*. The problem of Kyle's and Eric's parents can be cast in residency terms. If both Kyle and Eric attended private schools on January 1, 2005, but Kyle lived in Arizona and moved to Utah on January 1, 2006, under the Second Substitute his parents would receive the tuition tax credit in 2009 by dint of his not living in Utah on January 1, 2005, while Eric's parents would be denied the credit by dint of having lived in Utah on January 1, 2005.<sup>199</sup> The Original version does not contain an out-of-state on January 1, 2005 qualifier for the credit,<sup>200</sup> so it is not vulnerable to this problem. But both the Original and the Second Substitute convey a tax benefit for several years (i.e., the analysis in 2009 would apply to 2008 and after 2009, assuming both sets of parents keep paying private school tuition) based on a past distinction between Kyle and Eric that bears no rational relationship to the purposes of the statute.<sup>201</sup> This is similar to the invalid distinction in *Hooper* that made a distinction conveying tax benefits to one group of taxpayers based on a past distinction that bore no legitimate relationship to the statute's purpose.

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<sup>198</sup> *Supra* Part III.D.

<sup>199</sup> *Supra* Part II.

<sup>200</sup> *Supra* Part II.

<sup>201</sup> *Supra* Part II.

While the Original version and Second Substitute, which create a dramatic tax distinction between two similarly situated sets of parents, create an Equal Protection Clause problem, the First Substitute does not run into the same problem. Recall that the only distinction among parents paying the same private school tuition is one based on income: the lower the income, the higher the possible credit.<sup>202</sup> Means-testing a tax benefit does not create an Equal Protection problem, as it is a way to distribute the tax burden equitably. Of the three 2005 proposals, only the First Substitute is free of Equal Protection problems.

Why then was the First Substitute changed in the Second Substitute to disqualify most parents whose children were in Utah private schools on January 1, 2005 from taking the tuition tax credit? As discussed above, the change addressed fiscal concerns, as legislators deemed the cost to the Utah fisc of allowing these parents to claim the credit excessive.<sup>203</sup> However, the Supreme Court has not held that lost revenue is a legitimate state interest to allow a tax distinction between similarly situated taxpayers.<sup>204</sup> Even in *Madden* the Court allowed very different rates of tax on in and out-of-state accounts because of enforcement problems (i.e., it is harder to collect taxes from out-of-state accounts), not because of fiscal concerns.<sup>205</sup> If fiscal concerns were a legitimate state interest for Equal Protection Clause purposes, a state legislature could enact higher taxes on any group based on any distinction, and then justify it by claiming it results in more tax revenue for the State. Clearly that is not permissible under the Equal Protection Clause.

#### c. Recommendations for Utah's Legislature

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<sup>202</sup> *Supra* Part II.

<sup>203</sup> Ronnie Lynn, *Bill Scales Back Tuition Tax Break*, THE SALT LAKE TRIBUNE, Feb. 9, 2005, at A11; *supra* Part II.

<sup>204</sup> *E.g.*, *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

<sup>205</sup> *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88-89 (1940).

As the Utah school choice debate continues<sup>206</sup>, the Legislature needs to be cognizant of Constitutional concerns the next time it crafts a choice program such as a tuition tax credit. All the 2005 proposals were valid under the Establishment Clause. The Legislature should only enact school choice programs that are broadly available to a large group of parents, that do not favor religious schools over secular schools, and that allow parents to make a choice based upon the best interests of their children.

The First Substitute was the only 2005 proposal to pass both the Establishment Clause and the Equal Protection Clause. Should the Legislature in 2007 or beyond consider a tuition tax credit, it should make sure such a credit treats similarly situated taxpayers in an equal way. Distinctions based upon income, such as means-testing the credit and reducing the benefit for upper income taxpayers are valid. But distinctions based on a student's status on a date certain are questionable and the Legislature should avoid such distinctions to ensure validity under the Equal Protection Clause. If the Legislature needs to meet fiscal constraints, it should consider alternate options, such as reducing the credit upper-income parents receive.

## V. CONCLUSION

School choice programs, including tuition tax credit proposals, continue to present Constitutional concerns. Legislators must craft such proposals carefully to ensure that they comply with both the Establishment Clause and the Equal Protection Clause, while providing the desired choices to parents and not excessively draining the public fisc. In order to conform to the requirements of the Equal Protection Clause, a school choice program must have a secular purpose, be neutral toward religion, and be directed to a broad class of individuals who exercise

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<sup>206</sup> See Matt Canham, *School-voucher Group Hopes to Oust Opponents*, THE SALT LAKE TRIBUNE, Mar. 13, 2006, at B1.

a genuine and independent choice as to how to allocate their benefit dollars.<sup>207</sup> The Utah tuition tax credit proposals were all crafted in a manner sufficient to meet these requirements and thus pass muster under the Establishment Clause.

If a state legislature wants to implement a school choice program via a tuition tax credit, it must avoid creating distinctions among similarly situated taxpayers that violate the Equal Protection Clause. While well intended, the Original and Second Substitute proposals created a situation where taxpayers with the exact same economic circumstances would pay dramatically different amounts of Utah income taxes.<sup>208</sup> State legislatures should craft future tuition tax credit legislation that makes distinctions between taxpayers based on only on income, which is a valid and equitable way to confer differing benefits to taxpayers under the Equal Protection Clause.

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<sup>207</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 661 (2002).

<sup>208</sup> *Supra* Part IV.B.

\* GEORGE MASON LAW REVIEW, Editor-in-Chief; George Mason University School of Law, Juris Doctor Candidate, May 2007; Georgetown University, B.S.B.A., *magna cum laude*, Accounting, May 2000. I used another version of this Comment in Professor Harry Hutchison's Education and the Constitution Seminar at George Mason University School of Law. Thanks to Prof. Hutchison for his excellent insights. I also thank Marisa Connell, a dear friend, for her valuable help editing this Comment. All remaining mistakes are solely the responsibility of the author.